

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNIVERSAL CITY STUDIOS, INC., :

Plaintiff, :

82 Civ. 4259

-against- :

NINTENDO CO. LTD. AND :
NINTENDO OF AMERICA, INC., :

Defendants. :
-----x

AFFIDAVIT OF
HARRY W. O'NEILL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HARRY W. O'NEILL, being duly sworn, deposes and says:

1. I am President and Director of Opinion Research Corporation ("ORC"), a market research organization located in Princeton, New Jersey. ORC provides market and public opinion research services for a variety of nationally-known clients in the areas of product research, corporate communications and public policy.

2. In this affidavit, I will describe for the Court a study conducted by ORC for Townley & Updike, counsel for plaintiff, to test whether there is an association and likelihood of confusion between the Donkey Kong video game and the producers of the "King Kong" motion pictures among owners

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and managers of establishments which have bought or leased the Donkey Kong game. I will set forth my personal qualifications, the goals and methodology of the study, the study results and the basis for my opinion as an expert in the field of survey research that there is a likelihood of confusion among the owners and managers between the Donkey Kong video game and the producers of the "King Kong" motion pictures.

Personal Background

3. I have attached hereto as Exhibit 1 a copy of my curriculum vitae. Briefly, I graduated from Colgate University with a Bachelor of Arts degree in psychology and received a Master of Science degree in clinical psychology from Pennsylvania State University. I have also done additional graduate work in educational psychology at Rutgers University. After the completion of my education and training, I was a clinical psychologist with the United States Air Force. I was subsequently employed as a research analyst with The Prudential Insurance Company of America. In 1962, I became affiliated with ORC, where I have been employed to present. I have had extensive experience in the field of market and public opinion research, have taught university level courses in social and industrial psychology and have designed and supervised the administration of a number of significant market research and public opinion research projects for clients of ORC.

The Donkey Kong/King Kong Confusion Study

4. In March 1983, I was contacted by Douglas C. Fairhurst, Esq. of the law firm of Townley & Updike, about conducting a study concerning the Donkey Kong video game. The research objective proposed to me was to assess whether and to what degree retailers who had bought or leased a Donkey Kong game believed that it was derived from, authorized or sponsored by or connected in any way to the producers of the "King Kong" motion pictures.

5. In order to test the likelihood of confusion between Donkey Kong and King Kong, a telephone personal interview survey technique was selected. Phone calls were made to owners and managers of video arcades, bowling alleys and pizza parlors in fifteen major metropolitan areas throughout the United States, chosen to provide geographic diversity and national representation. The owners and managers were not told the objective of the study or the identity of ORC's client.

6. Since the objective of the study was to assess the degree of confusion, if any, between Donkey Kong and King Kong, the "universe," or study group, for the study as selected by me consisted of the owners and managers of video game arcades, bowling alleys and pizza parlors who had at least one Donkey Kong game in their establishment; I believed that, as the persons who decided to bring the game to the particular establishment, this group would be knowledgeable about the Donkey Kong game.

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7. A sample size of 150, drawn from the universe described above, was chosen for the study. The arcade, bowling alleys and stores were selected randomly from the yellow pages listings for the fifteen cities included in the survey.

8. The study administration involved supervisors and telephone interviewers, all who were employees of ORC. All interviewing was conducted from ORC's central telephone facilities in Princeton from April 12 through April 14, 1983. The interviewers were responsible for making the phone calls and filling out the survey questionnaire from the responses given to them by the phone call recipients. Supervisory personnel were always present during the telephone calls, and there was frequent monitoring of the interviewers' phone conversations by the supervisors. At no time were either the supervisors or the interviewers apprised of the objective of the study or the identity of ORC's client.

9. The actual telephone interviews were conducted pursuant to a straightforward questionnaire (see Exhibit 2 to this Affidavit). Once the interviewer was connected with the owner/manager of the video arcade, bowling alley or pizza parlor, ("respondent") the respondent was told that the interviewer was "conducting a survey about video games for Opinion Research Corporation."

10. The respondent was asked a "screening" question to ensure that there was a Donkey Kong game in the respondent's

establishment. If a particular establishment did not have a Donkey Kong video game, the interview was terminated.

11. The respondents were then asked how long the Donkey Kong game had been in their establishment, whether they recalled from whom they bought the Donkey Kong game, and whether they knew what company manufactured the Donkey Kong game.

12. In the final two questions on the questionnaire, the respondents were asked "Why do you think the game is called Donkey Kong" and "To the best of your knowledge, was the Donkey Kong game made with the approval or under the authority of the people who produced the King Kong movies".

13. After the interviewers completed the questionnaires, the results of the study were tabulated by ORC by keypunching the results into computer cards from the actual questionnaires, and then run off on ORC's internal computer. I personally coded and compiled the answers to the open-ended questions of the survey (See Exhibit 2, questions 4-7).

STUDY RESULTS

14. Of the 45% of the respondents who thought they knew the reason why the game was called Donkey Kong, 47% (21% of the total) gave an answer that directly related to or mentioned King Kong. Sixteen percent (7% of total) of the

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respondents mentioned a gorilla, ape or monkey, and 4% (2% of total) said it was from the movie, without specifically mentioning King Kong. Thus, of the 45% of the respondents who thought they knew the reason why the game was called Donkey Kong, 67% made a connection between Donkey Kong and the King Kong movie, the gorilla character, or a movie generally. Some typical comments referring to King Kong were:

- "Kong comes from King Kong"
- "From King Kong"
- "From the King Kong version from the ape"
- "Probably from the King Kong movie"
- "It's obviously a take-off from King Kong"

15. In response to a direct question as to whether the respondent knew if the Donkey Kong game was made with the approval or authority of the people who produce the King Kong movies, 18% replied that it was made with such approval or authority.

16. I prepared a report on behalf of ORC setting forth the objectives, methodology and results of this study. A copy of the report is attached hereto as Exhibit 3. The actual materials used in the survey are in the possession of ORC and will be produced for inspection by the Court if so desired.

17. On the basis of these survey results and my knowledge of the fields of consumer research and marketing, it

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is my opinion that a substantial percentage of the respondents connected the Donkey Kong video game to the character King Kong or the King Kong motion picture and that there is a likelihood of confusion between King Kong and Donkey Kong as demonstrated by the 18% of the respondents who believed that the people who produced the King Kong movies had sponsored or authorized the Donkey Kong game. These results are projectable to the universe selected for the study.

Harry W. O'Neill

HARRY W. O'NEILL

Sworn to before me this
5th day of July, 1983

Gail C. Ryan

NOTARY PUBLIC

GAIL C. RYAN
Notary Public of New Jersey
My Commission Expires Sept. 6, 1987

HARRY W. O'NEILL - PRESIDENT

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Harry W. O'Neill is President and a Director of Opinion Research Corporation in Princeton, New Jersey.

A member of Opinion Research Corporation, a subsidiary of Arthur D. Little, Inc., since 1962, Mr. O'Neill's activities span a broad range of survey research. His principal research activities have been in the fields of politics, public policy issues, corporate communications, and litigation studies. He has been involved in the direction of the public opinion research for numerous political campaigns including several presidential campaigns.

Mr. O'Neill is also active in client service and consultation. He has been a speaker before such groups as The Center for International Business, The Public Relations Society of America, Society of Consumer Affairs Professionals in Business, Advertising Club of Metropolitan Washington, Oyez-IBC Public Relations Seminar (London), American Bankers Association, Highway Users Federation, Wisconsin Manufacturers' Association, The Securities Industry Institute, The Financial Relations Society, The President's Council on Environmental Quality, and the Council for the Advancement and Support of Education.

Mr. O'Neill is Chairman of the Board of Directors of the Council of American Survey Research Organizations and President of the National Council on Public Polls.

Also, he is a member of the American Association for Public Opinion Research, the American Psychological Association, the Eastern Psychological Association, the Association for Consumer Research, and the Metropolitan New York Association for Applied Psychology.

Mr. O'Neill holds a B.A. degree, with honors, in psychology from Colgate University; an M.S. degree in clinical psychology from Pennsylvania State University; and has done additional graduate work in educational psychology at Rutgers University. He is licensed as a practicing psychologist by the State of New Jersey.

Prior to joining Opinion Research Corporation, Mr. O'Neill was a research analyst with The Prudential Insurance Company of America. Earlier he was a clinical psychologist with the United States Air Force, serving three years on active duty and seven years in the active reserve. For seven years, concurrent with his employment at Prudential and ORC, he was a member of the adjunct faculty of the psychology department of University College, Rutgers University, where he taught introductory psychology, industrial psychology, testing in industry, child psychology, and social psychology. Also, he has been a visiting lecturer in public and international affairs at the Woodrow Wilson School of Princeton University.

Among Mr. O'Neill's publications are articles in The Personnel and Guidance Journal, The Journal of Marketing, Public Opinion Quarterly, The Illinois Medical Journal, Occupational Health and Nursing, The Public Relations Journal, a chapter in a compendium on business ethics published by Saint Joseph's College, a chapter on political research in The Political Image Merchants: Strategies in the New Politics, a chapter on advocacy research in Polling on the Issues, and a chapter on the value of survey research to PACs in The PAC Handbook.

He is listed in Who's Who in America, Who's Who in the East, and American Men and Women of Science.